Supreme Court of the United States

October Term, 1923

No. 195

UNITED STATES OF AMERICA, ex rel. NICOLAS MARANGOS,

Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York,

Respondent.

ADDITIONAL BRIEF FOR THE APPELLANT

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Argued by
WALTER NELLES.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 148.

UNITED STATES OF AMERICA ex rel. NICOLAI MENSEVICH,
Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York,
Respondent.

ADDITIONAL BRIEF FOR THE APPELLANT.

(Upon the new state of facts brought to the attention of the Court in the brief for the appellee.)

Statement of Facts.

This case (a direct appeal from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas

corpus) was before this Court on November 19, 1923, upon the Solicitor General's motion to dismiss or affirm. The Court has put the case upon the summary docket, reserving decision upon the motion until the hearing on the merits.

The single point is whether the detention of the relator for deportation to Poland, as the "country whence he came" when the Secretary of Labor is clearly bound, in both law and fact, to hold that Poland is *not* the country whence he came, is arbitrary, and deprives him of liberty without due process of law.

The relator came to the United States in 1911 from Russia. His home was in the Russian Province of Grodno. Upon the record as it stood when our original brief was filed, the United States had not recognized Grodno as part of Poland, and the Courts were, we believe, bound to hold that it continued to be part of Russia.

The Solicitor General's brief, filed since the motion to dismiss, asks the Court to take judicial notice of the recent action of our State Department, taken during the pendency of this appeal, recognizing that Grodno is now part of Poland. We are thus, at this advanced stage of the case, confronted in effect with a new record, to which our original brief is largely inapplicable. It seems desirable in this additional brief not only to adapt our argument to the new facts (upon the assumption that the Court will take judicial notice of them), but also briefly to restate the whole case, referring to our original brief for such matters of fact and argument as are there fully presented.

The relator had two hearings in the Department of Labor—the first in September, 1921 (Record,

pp. 56-67), following which the warrant for his deportation to Poland, as "the country whence he came," issued on September 30, 1921 (Record, p. 10); and a rehearing in February, 1922 (Record, pp. 11-56), after which the relator was taken into custody for deportation to Poland under the same warrant that had previously been issued. He was in custody at Ellis Island for immediate deportation to Poland when the writ of habeas corpus was sued out in June, 1922 (Record, pp. 1, 2). The constitutional point was duly taken in paragraph twelfth of the petition (Record, p. 4); the facts supporting it were better stated in the traverse to the return (Record, pp. 84, 85), in which the allegations of the petition were reincorporated by reference.

The facts, which are undisputed, are as follows:

The relator was born, and presumably resided until his emigration in 1911, in the village of Tychny, Province of Grodno, Russia (Record, pp. 11, 56). He speaks Russian and is of Russian race (Record, pp. 54, 14). He claims Russian citizenship (Record, p. 12). He came to the United States from Russia in 1911 under a Russian passport (Record, pp. 12, 14) and has remained continuously in the United States (op. cit.).

Poland was erected into an independent sovereignty by the Versailles treaties of June 28, 1919. Its eastern boundary was left for future determination (Versailles Treaty, Art. 87). Poland was authorized to proceed forthwith to effect its civil organization of the territory *west* of the Curzon Line.

The Province of Grodno lies *east* of the Curzon Line. Historically and ethnologically it belongs, not to Poland, but to Lithuania. Lithuania and Poland were united in sovereignty through the marriage of a Polish princess to a Lithuanian prince in 1386. The union lasted until the Russian annexation of Lithuania and part of Poland in 1795; Lithuania remained throughout, however, distinct from Poland. The Lithuanians kept not only their language and religion, but also their own law. They were in frequent revolt against Polish interference and predominance; their feeling was strong for union with Russia (*W. R. Morfill, Poland*, Story of the Nations Series, Putnam's, 1893, pp. 14-16, 47, and passim).

A large part of this Lithuanian region east of the Curzon Line, including the Province of Grodno, was conquered by Poland in war with Russia between 1919 and 1921. It was ceded to Poland by a treaty with the Soviet Government of Russia at Riga, March 18, 1921.

As our government, however, does not recognize the Soviet Government of Russia, and has often expressed itself as unfavorable to the recognition of dismemberments of the former Russian Empire unless clearly final, our State Department did not then recognize either the Polish conquest or the Treaty of Riga as affecting the sovereignty of the territory east of the Curzon Line (Secretary Hughes' letter of July 11, 1922, Record, p. 84; p. 6 of our original brief). Under the authorities cited in our original brief (pp. 7-11) questions of this character are political, not judicial, and the position taken by the State Department is conclusive upon the Department of Labor in deportation proceedings and upon the courts.

At the time of the habeas corpus proceeding in the District Court, June and July, 1922, the District Court was bound to hold that the Province of Grodno was presumed, until an inconsistent position should be taken by the political branch of our Government, still to appertain to the last sovereign whose government had been recognized by the United States—the Kerensky government of Russia. It was not, in law, a part of Poland, and detention of an emigrant from Grodno for deporatation to Poland as the "country whence he came" was clearly arbitrary (pp. 11-17 of our original brief). It was as if a German emigrant from the Ruhr had been ordered deported to "France, the country whence he came."

The brief for the appellee calls attention to subsequent action by our State Department which, if judicially noticed and deemed to relate back to the time of the deportation and habeas corpus proceedings below, makes the case analogous rather to that of a German emigrant from Alsace now ordered deported to France as the country whence he came.

On March 14, 1923, the Council of Ambassadors at Paris recognized the frontiers of Poland as laid down by a supplemental agreement between Poland and Russia at Riga on November 23, 1922, supplementing and confirming the Treaty of Riga of March 18, 1921. This recognizes the cession by Russia to Poland of the territory east of the Curzon Line, including the Province of Grodno. Our State Department recognized this new eastern frontier of Poland in March and April, 1923 (Appellee's Brief, Appendix, pp. 16-19). The Province of Grodno is now, therefore, part of Poland.

This Brief.

(1) We question whether this recognition of a new Polish frontier east of the Province of Grodno should be judicially noticed and deemed to relate back. (2) Assuming that it is noticed and deemed to relate back to the time of the proceedings below, Poland does not become the country whence the alien came. He came from Russia in 1911. His detention for deportation to Poland is none the less arbitrary, and deprives him of liberty without due process of law. (3) This Court has jurisdiction upon a direct appeal.

ARGUMENT.

I.

Quaere whether the recognition, subsequent to the proceedings below, that the province of Grodno is now part of Poland should be judicially noticed.

The recognition during the pendency of an appeal of a revolutionary government will be judicially noticed and given retroactive effect to validate property rights derived from it (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297). But if the action of the Department of Labor was in fact arbitrary at the time, it is not easy to see how the subsequent course of history may be held to endow it with the quality of due process of law. The question here is dissimilar to that of property rights derived from a *de facto* government.

II.

The Secretary of Labor has no authority to deport the alien to another country than the country whence he came, even though such other country has acquired, since his emigration, the region of his former domicile.

The powers of Secretary of Labor with respect to destination of deportable aliens are limited and defined by Section 20 of the Immigration Act of February 5, 1917 (ch. 29; 39 Stat. 874). The material language is as follows:

> "Sec. 20. That the deportation of aliens provided for in this act shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States, or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their re-entry, or imposes any condition upon permitting re-entry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States."

Clearly, upon the record in this case, the only power which these provisions give to the Secretary of

Labor is a power to deport Mensevich to "the country whence he came."

We do not conceive this case as involving the correctness of a construction by the Secretary of Labor of the phrase "country whence he came." We conceive that it presents rather an election by the Secretary of Labor to deport the alien to a country other than the country whence he came—an act of naked arbitrary power.

A question of construction arises only when the statutory power is so expressed as to raise doubt, difficulty, ambiguity or uncertainty as to its precise scope. The phrase "country whence he came," in relation to the facts of this case, is entirely clear. In other cases, such as those cited in our original brief (pp. 13-16), there have been questions of construction—whether "country whence he came" refers exclusively to country of former domicile, or whether it may also include a country of still earlier domicile or a country of temporary later sojourn. The word "country," however, presents no difficulty of construction. It refers to a territory with definite bounds, forming a distinct unit over which sovereignty is exercised. One sovereign, as in the case of the British Empire, may rule many countries; but each is a distinct and definite entity, both geographically and politically. Here, for the first time, a question of the construction of the word "country" is attempted to be raised (not by us, but by the appellee) upon the artificial theory that the word, in a statute touching the field of international relations, is used in the loose and indefinite sense of *locality*: "a district of indefinite extent present to the view of thought" (Century Dictionary).

Of course the word has often this meaning in popular speech or literature: "He came from the country east of the Curzon Line—a country inhabited by Lithuanians and White Russians." But to feel the preposterousness of such a sense of the word in such a statute, it is only necessary to imagine that the Secretary of Labor had made an order for deportation "to the Grodno region, the country whence he came." The United States has no diplomatic relations or treaty with the Grodno region; it has no practical power to transport an alien across the country of which it is part and deposit him there. The assertion of such a power would be an enormity in international law and usage. Our legislation stops at the doorway of a friendly foreign sovereign. It does not enter his house.

Accordingly, deportation of a Savoyard is accomplished by depositing him at Havre; deportation of a Saxon to Germany by depositing him at Bremen; deportation of a Scotchman to Great Britain by depositing him at Liverpool. It is unthinkable that Congress should have intended to force upon the Secretary of Labor the ampler duty or power, impracticable of exercise, to restore an alien to the exact locality of his former domicile or sojourn. Deportation to Poland would not in fact restore Mensevich to the region whence he came. It would deposit him in some remote and alien part of Poland.

We disavow the contention imputed to us by the appellee that "country whence he came" necessarily means country of which he is a citizen or subject. The enormity of deporting a man to a country other than that whence he came is, how-

ever, emphasized by consideration of the difference between his relation to the country whence he came and his relation to the country to which it is proposed that he be deported.

Mensevich came from Russia, of which he was a citizen and in which he had a domicile. It is proposed to deport him to a country with which he has never had domiciliary or other relations and of which he is not a citizen.

The citizenship of non-resident natives of the conquered territory east of the Curzon Line is determined by the Treaty of Riga of March 18, 1921 (accessible only in typewritten translation at the Department of State).* Under the provisions of

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* The provisions of the Versailles treaties of June 28, 1919, apply only to persons from the territory west of the Curzon Line. The main treaty provides (Art. 91) that "Poles who are German nationals and are in a foreign country" may "obtain Polish nationality and lose their German nationality by complying with the requirements laid down by the Polish State." But by the separate treaty of the same date between Poland and the Allied Powers (Art. 4) Poland agreed to accept as Polish nationals all Russians and Germans born in said territory (i. e., west of the Curzon Line) of parents habitually resident there, even if resident abroad.

The Treaty of Riga of March 18, 1921, provides as follows as to natives of the conquered territory east of the Curzon Line:

> "Art. 6, par. 1. All persons over 18 years of age, who at the moment of ratification of this treaty are resident in the territory of Poland, and on August 1st, 1914, possessed the citizenship of the former Russian Empire and are registered or have a right to be registered in the registers of the permanent population of the former Kingdom of Poland, or were registered in the urban or in the rural communes, or belonged to the organizations of the social orders in the territories of the former Russian Empire which are now included in the territory of Poland, have a right to make a declaration for the option of Russian or Rumanian citizenship. From other citizens of the former Russian Empire of other categories, resident at the moment of ratification of this Treaty in the Polish territory, such a declaration is not required."

Paragraph 2 provides that persons of the categories defined in paragraph 1, and also persons of Polish extraction or sympathies, resident at the time of ratification in Russia or the

this treaty Mensevich could not obtain Polish citizenship save by filing a declaration within one year—and not then unless (1) he was a member of one of the specifically defined categories or of Polish extraction or sympathies, and (2) his declaration was accepted by the Polish authorities.

It is thus apparent that birth or former residence in the territory east of the Curzon Line which has now become Polish carries no automatic appertinence to Poland.

A similar situation exists as to Germans who emigrated from Alsace while it was under German rule. Under the Treaty of Versailles (Part III, Sec. V, Art. 53 and Annex) Alsations who lost French nationality in 1871 and those of their descendants whose ancestors include no German migrant are *ipso facto* reinstated in French nationality. Those whose ancestors include a German migrant, even if domiciled in Alsace, may become French, subject to French rejection, only by filing declaration within one year. German migrants and their descendants could become French only by naturalization, and not then except on proof of Alsation domicile prior to August 3, 1914, and three years unbroken residence subse-

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Ukraine, may become Polish citizens "if they make due declaration in conformity with the regulations of the option."

"3. Regulations concerning the option also concern persons who answer the requirements of Paragraphs 1 and 2 of this article, *if the said persons are residing outside of boundaries of Poland, or of Russia and Ukrainia,* and are not citizens of the State in which they are resident."

"5. Declarations for the choice of citizenship shall be applied for * * * in the term of one year from the moment of the ratification of this treaty."

Paragraph 6 provides that the making of declaration does not confer the chosen citizenship unless the declaration be accepted.

quent to November 11, 1918.* Germany is obligated (Art. 53) to receive all Alsations who have not been accepted as French. The treaty does not discriminate between Alsation residents and Alsations residing abroad. But it is reasonably clear that in the case of an Alsation of German stock abroad, France would repudiate the suggestion that France was the "country whence he came."

In the face of the actual plight of a German emigrant from Alsace who should now be "restored" to France or a Russian emigrant from Lithuania who should now be "restored" to Poland, we may leave unchallenged the assertion of the appellee (p. 11 of his brief) that Section 20 of the Immigration Act expresses a broad intent that the deportable alien "be restored as nearly as possible to the situation in which he stood immediately prior to his emigration."* Mensevich's situ-

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* Paragraph 3 of the Annex is as follows:
"subject to the provisions of Paragraph 2" (which relates primarily to Alsations of French descent but with a German migrant in their ancestry) "Germans born or domiciled in Alsace-Lorraine shall not acquire French nationality by reason of the restoration of Alsace-Lorraine to France, even though they may have the status of citizens of Alsace-Lorraine. They may acquire French nationality only by naturalization, on condition of having been domiciled in Alsace-Lorraine from a date previous to August 3, 1914, and of submitting proof of unbroken residence within the restored territory for a period of three years from November 11, 1918."

* This assertion is of course abundantly subject to challenge. Section 20 confers upon the Secretary of Labor no indefinite discretion to choose the destination which may seem to him most suitable under the circumstances. Its directions are definite and specific, with specific alternatives for specific contingencies. Exercise of the alternative power to deport to the foreign port at which the alien embarked to the United States would obviously, in most cases, put the alien in a very different situation from that in which he stood immediately prior to emigration. So would the alternative to deport to the country of which he is technically a citizen or subject in the situation when the country from which he emigrated attaches conditions to receiving him.

It is worth noting that the alternatives, except that to deport to port of embarkation, obviously call for deportation to a *country* which is a definite political entity, not to a definite town or province or an indefinite *region*.

ation in Warsaw or elsewhere in Polish Poland, or even in Grodno in the uncertain contingency of his actually reaching it—a contingency which the Secretary of Labor has no power to bring to pass and no statutory authority to attempt to bring to pass—would be entirely unassimilable to that in which he stood immediately prior to his emigration.

It is unnecessary to consider whether the Secretary of Labor's powers under Section 20 are holeproof—whether a situation might arise in which there would be no country in which the Secretary of Labor would be authorized to deposit a deportable alien.* We withdraw our suggestion (p. 17 of our original brief) that the case at bar presents a situation for which Section 20 does not provide.

For it seems to us, on consideration, that Russia, the country whence Mensevich came, still exists

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*This is theoretically possible. Neither logic nor history warrants an assumption that a *country*, any more than a particular sovereignty or form of government, has perpetuity of existence. Poland doubtless ceased to exist as a country at the time of its partition between Russia, Germany and Austria in 1795.

The possibility that a country whence an alien came may cease to exist would not warrant a forced construction of Section 20—a reading into it of a provision that in such event the Secretary of Labor may deport to some other country. If the possibility is of practical consequence, it is for Congress to provide against it. It was not of such practical consequence as to be within the contemplation of Congress when Section 20 of the Act of February 5, 1917, was enacted. At that time there had been no extinction or disappearance of a country for generations. The law and practice as to deportation, moreover, were to deport, if at all, almost contemporaneously with entry. Deportations subsequent to entry were, with inconsiderable exceptions (Section 19 of the Act of 1917—consolidating, without substantial alteration, much earlier provisions), expressly required to be effected within a limited period after entry. Extinction of country between entry and deportation was unlikely. It was not until 1918 (Act of October 16, 1918, Chap. 186, 40 Stat. 1012) that the class of aliens deportable "at any time after entry" was greatly enlarged, and deportation of aliens long rooted in American soil became common.

—that neither the attrition of its borders nor its internal vicissitudes have destroyed its continuity as a distinct entity. Since the Immigration Act deals with countries, not regions, the detachment from Russia of the region whence Mensevich came in no way affects the statutory authority of the Secretary of Labor to deport him to Russia, the country whence he came. Nor does the change or interregnum of government, however it may be viewed. Russia remains as an entity, subject as an entity to sovereignty and distinct from all other units of sovereignty—a country, distinct from all other countries—the same country, in substance, as the country whence Mensevich came.

The Secretary of Labor had a clear statutory authority to order that Mensevich be deported to Russia, the country whence he came. The order for his deportation to "Poland, the country whence he came" proceeds in flat disregard of this statutory authority; it cannot be palliated as a reasonable misconstruction of the statutory authority. That the contiguous country of Poland, and not Italy or Turkey, is the conqueror of the Lithuanian province of Grodno, is a fortuitous circumstance. The order for Mensevich's deportation to Poland is not less naked than would be, were Turkey the conqueror, an order for his deportation to "Turkey, the country whence he came."

III.

This Court has jurisdiction upon a direct appeal.

The point that an executive act is naked and arbitrary involves the application of the due process clause in much the same way as an executive finding unsupported by evidence. When there is some reasonable color for a claim that the act is within a stautory authority, as where there is some evidence, though slight and unsatisfactory, to support a finding, the application of the due process clause may not be involved.

The appellee argues that the detention of Mensevich for deportation to Poland had at least some reasonable color of statutory authority, and was therefore not an act of naked arbitrary power; that the application of the due process clause is secondary and remote; that if this case be held to involve the application of the constitution, practically all cases involving the scope and construction of a statutory authority would be brought within the jurisdiction of this Court upon a direct appeal. We have pointed out, however, that the claim that the case involves the construction of the Secretary of Labor's statutory authority arises only by way of defensive afterthought. It is a case of disregard of statutory authority.

The numerous cases cited in support of the appellee's contention (Appellee's Brief, pp. 6, 7) are far from analogous to this case. They include a case where the ground upon which jurisdiction was claimed was so far-fetched that it was not, and perhaps could not be, stated in the opinion

(*Ketcham* v. *Burr*, 245 U. S. 510); a case where the jurisdiction was invoked under entirely different statutory language—that of the District of Columbia Appeals Act—from that of Section 238 of the Judicial Code and the question was dissimilar (*Taylor* v. *Taft*, Secretary, 203 U. S. 461.; cases where jurisdiction was claimed on the ground that the construction of a treaty was involved, when the treaty provisions were in fact clear and the real question was as to the doubtful scope and meaning of a subsequent statute (*Sloan* v. *U. S.*, 193 U. S. 614; *Chin Fong* v. *Backus*, 241 U. S. 1); and cases where the substantial question was simply as to the correctness of a decision by a lower court under general principles of law (*In Re Lennon*, 150 U. S. 393; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225; *Carey* v. *Houston and Texas Central R. R.*, 150 U. S. 170).

American Sugar Refining Co. v. *United States*, 211 U. S. 155, the case most strongly relied upon against the jurisdiction here, illustrates the distinction between an act done with reasonable color of statutory authority and an act of naked power. In that case the statute directed the Secretary of the Treasury to make polariscopic tests of sugar to determine the amount of customs duty. The question was whether the Secretary was bound to conduct the polariscopic tests in accordance with the custom of the trade, or whether he might conduct them with greater scientific accuracy. Whether or not the Secretary was right in deeming that the statute authorized him to conduct the tests with scientific accuracy, he was clearly not arbitrary. He was construing, though possibly misconstruing, his statutory authority, not

acting in disregard of it. This Court accordingly declined jurisdiction.

Clearly if, upon the record in the case at bar, the Secretary of Labor had detained Mensevich for deportation to "China, the country whence he came," his arbitrary disregard of the limits of his statutory authority would involve the application of the due process clause. On the other hand, the appellee is probably correct in saying that the cases turning upon whether "country whence he came" includes the country of former temporary sojourn as well as the country of former domicile involve rather a question of statutory construtions; either view, in the light of the statutory language, may with some reasonableness be maintained.

Not so, however, the contention that the order for deportation to Poland in this case was based upon a construction or misconstruction of "country whence he came"—that "country whence he came" in such a statute, used almost in the same breath with the alternative as to "country of which such aliens are subjects or citizens," means an indefinite region which is not and has never been a distinct unit of sovereignty—a construction inconsistent with the course adopted by the Secretary of Labor, who at least wrote in the warrant the name of a country, Poland, not that of the Grodno region. The argument is palpably manufactured, not to support a statutory construction relied upon by the Secretary, but to cloak the nakedness of a flat disregard of the limits of the statutory power.

The order appealed from should be reversed and the writ of habeas corpus sustained.

Dated, December , 1923.

Respectfully submitted,

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